REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO(OS) NO. 102 OF 2004**

% **Date of Decision** : 16th March, 2007.

M/S. RITE APPROACH GROUP LTD. .... Appellant.
Through Mr. Jasmeet Singh, Advocate.

VERSUS

M/S.ROSOBORONEXPORT .... Respondent.
Through Mr. Siddhartha Dave, Advocates

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CORAM:

HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J:

1. M/s. Rite Approach Group Ltd (hereinafter referred to as the appellant, for short) has filed the present Appeal against the Order dated 25th May, 2004 passed by the learned Single Judge rejecting

it's application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act, for short).

2. Learned counsel for the appellant has relied upon the decision of the Court of Appeal in the case of ***Mareva versus International Bulkcarriers*** reported in (1980) 1 All.ER 213 and submitted that M/s.Rosoboronexport (hereinafter referred to as the respondent, for short) is liable to pay to the appellant, commission of Rs.28.8 crores on sale of six helicopters by M/s Kazan Helicopters Ltd. to Border Security Force. Reliance is placed upon agency agreement between the appellant and M/s Russian Technologies and it claimed that the respondent herein has taken-over the said company. It is submitted that the Government of India should be injuncted by Mareva injunction from making full payment of the two helicopters to the respondent and the respondent should be restrained from dealing with the said helicopters.

3. Detailed facts have already been noted by the learned Single Judge in the impugned Order and are therefore not reproduced. However, the learned Single Judge in the impugned Order has noted that the

Government of India is not a party to the so called arbitration clause existing between the appellant and the respondent. Contention of the respondent that the respondent was not an agent of the appellant, dealings between the appellant and M/s Russian Technologies were separate and independent and agency agreement is not binding on the respondent and other pleas were raised.

4. Learned Single Judge has noted that the number of helicopters and their models and that the supplies made to the Ministry of Home Affairs did not tally with the agreement between the appellant and M/s Russian Technologies, which was in respect of 16 helicopters to be supplied to Ministry of Defence. Moreover, the Ministry of Defence had in the agreement specifically stipulated that there shall be no agent for the purpose of intercession, facilitation or for in any way recommendation to the Government of India or any of the functionaries of the Government. Learned Single Judge further noticed that the respondent is a State owned undertaking of the Government of Russia and therefore has sufficient assets to satisfy any decree in favour of the appellant. Lastly, it was observed that

provisions of Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code, for short) or conditions stipulated therein can be read into Section 9 of the Act but the strict preconditions specified in the said provision were not satisfied in the present case. Learned Single Judge relied upon the case of ***M/s.Global Company versus National Fertilizers Ltd.*** Reported in AIR 1988 Delhi 397 and an unreported judgment of the Bombay High Court in the case of ***National Shipping Company versus Sentrans Industries Limited,*** in Appeal No.852/2003

5. We need not enter into detailed controversy as the respondent has filed an affidavit enclosing therewith letter dated 19th August, 2005. In this letter, it has been specifically stated that the respondent has already received the entire money from the Government of India towards supply/sale of the two helicopters. The aforesaid letter was filed along with affidavit dated 7th November, 2005. Learned counsel for the appellant, in these circumstances, took repeated adjournments and at the time of hearing, filed in the Court, a copy of the affidavit dated 2nd March, 2007. In this affidavit it is stated that to

the best of the knowledge and belief of the appellant, the respondent has not received money from the Government of India under the Agreement dated 14th April, 2000 and Letter of Credit of June, 2003 bearing No.0096103DC028270. This affidavit as filed shows that the appellant does not have full information and knowledge and has merely presumed that the sale consideration of the two helicopters has not been paid. The said affidavit is no statement and affirmation under oath that can be relied upon. In **Sukhwinder Pal Bipan Kumar versus State of Punjab**, *reported in* (1982) 1 SCC 31, it was observed that an affidavit asserting or denying allegations as correct to the best of the deponent's knowledge is no affidavit and is contrary to requirement to Order 19, Rule 3 of the Code which requires the deponent to disclose nature and source of his knowledge with sufficient particularity. Moreover, the application under Section 9 of the Act was filed in 2004 and till today, during the last three years, the appellant has not invoked the arbitration clause.

6. The appellant is based in Singapore and Austria. The respondent is

a company operating and having its registered office in Russia. Without examining and going into the question whether injunction can be issued on an application under Section 9 of the Act by the Courts in India, it may be noticed that the Court of Appeal in the case of ***Mareva versus International Bulkcarriers*** (supra) had held that freezing injunction should not be granted unless a person has a legal or equitable right, it appears that a debt is due and owed and there is danger that the debtor may dispose of his assets before the judgment is passed so as to defeat the decree which may be passed. Injunction order even as per the Court of Appeal can be issued in extraordinary circumstances. Mareva or freezing injunction is passed when there is evidence or material to show that the debtor is acting in a manner or is likely to act in a manner to frustrate subsequent order/decree of the court or tribunal. The Court therefore freezes the assets of the debtor to prevent the assets from being dissipated, to prevent irreparable harm to the creditor. It prevents a foreign defendant from removing his assets from the jurisdiction of the court. It is like and akin to “attachment before judgment” and conditions

mentioned in the said provision should be satisfied before freezing junction order is passed. (See ***Formosa Plastic Corporation Ltd. Versus Ashok Chauhan*** reported in 76(1998) DLT 817 and ***Uppal Eng. Co. (P) Ltd. Versus Cimmco Birla Ltd.*** reported in 121 (2005) DLT 539). The respondent-Company is owned by Russian Government and there is no such allegation that the respondent company is trying to defeat and play a fraud by moving/transferring its assets. We agree with the reasoning given by the learned single judge.

7. We do not find any merit in the present Appeal and the same is dismissed.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)
CHIEF JUSTICE

MARCH 16, 2007
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